INDEX

	Page
Questions presented	1
Interest of the United States and the Commission	2
Statement	3
Argument	7
Conclusion	15

CITATIONS

Cases:

Agreement 7700—Establishment of a Rate Structure, 10 F.M.C. 61, aff'd *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 .. 13, 14

Agreement No. 9025: Dockage Agreement, 8 F.M.C. 381 .. 13

Consolo v. *Federal Maritime Commission*, 383 U.S. 607 .. 8

Continental Nut Co. v. *Pacific Coast River Plate Brazil Conf.*, 9 F.M.C. 563 .. 13

D. L. Piazza Co. v. *West Coast Line, Inc.*, 3 F.M.B. 608, 210 F. 2d 947, certiorari denied, 348 U.S. 839 .. 10, 11

El Dorado Oil Works v. *United States*, 328 U.S. 12 .. 7

Empire State Highway Transp. Ass'n v. *American Export Lines*, 5 F.M.B. 565, affirmed *sub nom. Empire State Transp. Ass'n* v. *Federal Maritime Board*, 291 F. 2d 336, certiorari denied, 368 U.S. 931 .. 12, 13

Ex Parte 4, Section 15 Inquiry, 1 U.S.S.B. 121 .. 13

381-035—70——1

Cases—Continued

	Page
Interstate Commerce Commission v. *Atlantic Coast Line R. Co.*, 383 U.S. 576	7
North Atlantic Westbound Freight Ass'n v. *Federal Maritime Commission*, 397 F. 2d 683	13
Pennsylvania R. Co. v. *United States*, 363 U.S. 202	7
Rochester Telephone Co. v. *United States*, 307 U.S. 125	7
Swift & Co. v. *Federal Maritime Commission*, 306 F. 2d 277	13
Trans-Pacific Freight Conference of Japan v. *Federal Maritime Commission*, 314 F. 2d 928	13
Volkswagenwerk v. *Federal Maritime Commission*, 390 U.S. 261	5, 6, 10, 11, 12, 13
Statutes:	
Administrative Orders Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1031 *et seq.* reenacted by Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 621–624, and recodified as 28 U.S.C. 2341 *et seq.* (1964 ed., Supp. IV)	5, 7, 8, 11
28 U.S.C. 2342	8
28 U.S.C. 2344	8, 9
28 U.S.C. 2348	9
28 U.S.C. 2349	9
Shipping Act, 1916, as amended:	
Sec. 15, 46 U.S.C. 814	3, 4, 6, 12, 13, 14
Sec. 17, 46 U.S.C. 816	4, 10
Sec. 29, 46 U.S.C. 828	8
Sec. 30, 46 U.S.C. 829	8
Sec. 31, 46 U.S.C. 830	8
Urgent Deficiencies Act, 38 Stat. 208	8
Miscellaneous:	
Annual Reports of the Federal Maritime Commission (1969 and 1968)	14

Miscellaneous—Continued
Hearings on H. R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess. ---------- Page 14
H. Rep. 498, 87th Cong., 1st Sess. ---------- 14
S. Rep. 860, 87th Cong., 1st Sess. ---------- 14

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1251

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL., PETITIONERS

v.

REDERIAKTIEBOLAGET TRANSATLANTIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, on reference from a district court entertaining private litigation, may be attacked collaterally in the district court action rather than in accordance with the exclusive direct review procedures provided by the Administrative Orders Review Act.

2. If such collateral attack is not improper, whether the Commission properly determined that a tariff amendment shifting the incidence of certain storage

charges from cargo to vessel was within the scope of the conference agreement previously approved by the Commission and therefore did not require specific prior approval.

INTEREST OF THE UNITED STATES AND THE COMMISSION

The decision below that a Federal Maritime Commission determination may be attacked otherwise than pursuant to the statutory direct review procedures seriously interferes with the purposes of the Shipping Act and the Administrative Orders Review Act. It would permit Commission orders to be attacked long after the time for direct review has run, thus impairing their finality, and further would permit them to be attacked in private litigation where neither the Commission or the United States would necessarily be a party or even have official notice of the attack. Since this decision raises serious questions concerning the procedures for judicial review of orders of the Commission and other agencies, we submit this memorandum, pursuant to Rule 42(4) of this Court's Rules, to support the petition for a writ of certiorari.

Furthermore, even if collateral review were proper, we believe that the court below has erroneously decided an important substantive question under the Shipping Act. The decision that Commission approval of a conference agreement does not authorize the conference members to make conventional tariff changes without specific prior approval would undermine the Commission's longstanding position and would seriously affect the administration of the Act. Thus, we believe

that this substantive question would warrant this Court's consideration if it were properly presented here.

STATEMENT

The Port of Boston Marine Terminal Association (Terminals) is a conference of marine terminal operators which operates pursuant to an agreement (No. 8785) approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 46 U.S.C. 814. The agreement authorizes the operators to act together in setting rates and charges for the furnishing of marine terminal facilities and services, including wharfage, dockage, free time and wharf demurrage.[1]

Terminals, on behalf of its members filed a tariff of rates and charges with the Commission, as required by the agreement. This tariff originally provided that, in the event of a longshoremen's strike, the cargo owner would pay a diminished charge for cargo remaining on the piers during the strike. In 1964, Terminals revised the tariff so as to shift the incidence of such charge from the cargo to the vessel. When a strike occurred in 1965 and several vessels refused to pay the charge, Terminals brought an action for declaratory relief and payment against Boston Shipping Association (Shipping), an organization representing various

[1] "Wharfage" is a charge for use of the piers by shippers and consignees and is assessed against all cargo going across the pier. "Dockage" is a charge assessed against the vessel for space alongside the pier. "Free time" is a period of time during which cargo is permitted to remain on the pier free of charge, immediately prior to being loaded on the vessel or immediately after discharge from the vessel. "Wharf demurrage" is a charge usually assessed against cargo which remains on the pier after the expiration of free time (Pet. App. B, 410–411, n. 1–4).

vessel owners and operators. The district court (to which the action was removed from the State court where it had been begun) referred the issues concerning the lawfulness of the tariff amendment raised by Shipping to the Commission, under the doctrine of primary jurisdiction, and stayed its proceedings until the Commission should decide the matter.

Shipping thereupon filed a complaint with the Commission. After full evidentiary hearing, the Commission on June 28, 1967, issued a report and order (Pet. App. B, 409–420) sustaining the validity of Terminals' tariff amendment under the Shipping Act in all respects here relevant. It held that the amendment shifting the strike storage charge from the cargo to the vessel was within the scope of Terminals' basic agreement already approved by the Commission (No. 8785, *supra*) and so did not require additional prior approval by the Commission as a new agreement or modification under Section 15 of the Shipping Act (Pet. App. B, 413–414). The Commission further held that it is not an unreasonable practice, within the meaning of Section 17 of the Shipping Act (15 U.S.C. 816), for such charge to be assessed against the vessel for cargo which, when the strike begins, is still in free time (*i.e.*, has been on the dock less than five days after discharge from the vessel (*id.* at 414–417)).[2]

[2] The Commission also ruled, however, that it is an unreasonable practice to access such charge against the vessel for cargo which, when the strike begins, is no longer in free time (*id.* at 417–418). This aspect of the Commission's decision was not in issue in the district court litigation, since the relevant cargo was still in free time when the strike began.

On September 19, 1967, more than three weeks after expiration of the sixty-day time limit specified in the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*, Pet. 18–19), Shipping filed a petition for review of the Commission's order in the Court of Appeals for the District of Columbia Circuit. The petition was dismissed as untimely.

On September 4, 1968, the respondent here, Rederiaktiebolaget Transatlantic (Swedish), a carrier against which strike storage charges had been assessed, petitioned the Commission for reconsideration of its decision, claiming that it was inconsistent with this Court's decision on March 6, 1968 in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261. Swedish claimed to have been represented in the Commission proceedings.[3] The petition was returned as untimely under the Commission's Rules of Practice and Procedure, and Swedish sought no review of this action. On April 16, 1969, the district court granted Swedish's motion to intervene as a defendant in the resumed district court proceedings.

The district court thereafter rendered judgment against all the defendants. After noting that the defendants had not sought timely direct review of the Commission's order and that Swedish had sought no

[3] Swedish's petition for reconsideration stated that "It is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of * * * Shipping * * * which, with its member lines, filed the complaint in this proceeding [*i.e.*, the proceeding before the Commission]." (R. Vol. I, 81, par. #1). The petition further stated that Terminals claims the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions." (*Id.*, at 82, par. #3).

review of the Commission's denial of its petition for reconsideration (Pet. App. B, 35), Judge Wyzanski ruled as follows (*id.*, at 35–36):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals for the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

Swedish alone of the defendants appealed, and the court below reversed. Reasoning that *Volkswagenwerk, supra,* had undermined the basis of the Commission's decision, the Court of Appeals for the First Circuit, per Chief Judge Aldrich, held that Terminals' tariff amendment was invalid because it was a "modification"' of a Section 15 agreement and had not received the Commission's specific prior approval (Pet. App. B, 4–5). The court further held that Swedish was not bound by the Commission's decision because it had not been a party to the proceedings before the Commis-

sion (*id.*, at 6). The court therefore directed that judgment be entered for Swedish (*ibid.*). Terminals filed its petition for writ of certiorari on February 27, 1970.

ARGUMENT

1. By allowing what amounts to a collateral attack on a Commission order in the district court, the court below has improperly extended the jurisdiction of the district courts in a manner inconsistent with the exclusive review provisions of the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.* Since this conclusion is in conflict with a decision of the Court of Appeals for the Second Circuit and affects orders of a number of other agencies, we believe it warrants review by this Court.

a. The Commission's orders deciding the validity of Terminals' tariff amendment and denying Swedish's petition for reconsideration determined "right[s] or obligations[s]" so that "legal consequences" flowed therefrom. They were therefore reviewable final orders. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 602; *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143. "Such review 'is equally available whether [the Commission's] * * * proceeding follows referral by a court or originates with the Commission.'" *Atlantic Coast Line, supra*, 383 U.S. at 602; *Pennsylvania R. Co., supra*, 363 U.S. at 205; *El Dorado Oil Works* v. *United States*, 328 U.S. 12. The exclusive method provided by Congress for attacking the validity of the Commission's orders is, as we show more

fully below, the filing of a petition for review in a court of appeals pursuant to the procedures established in the Administrative Orders Review Act.

Section 31 of the Shipping Act (46 U.S.C. 830) states that "except as otherwise provided" the "venue and procedure" governing suits to "enforce, suspend, or set aside, in whole or in part, any order of the [Commission]" shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission.[4] This statutory incorporation of the procedures for district court review under the Urgent Deficiencies Act (38 Stat. 208) was superseded, however, by the Administrative Orders Review Act of 1950, 64 Stat. 1129, reenacted and recodified in 1966 as 28 U.S.C. 2341 *et seq.* (1964 ed., Supp. IV), 80 Stat. 621–624. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 612–614.

Pursuant to 28 U.S.C. 2342, the several courts of appeals have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of such final orders of the Commission as were previously subject to judicial review under Section 31 of the Shipping Act. An order can be attacked only by filing a petition for review within 60 days

[4] The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), both of which relate to enforcement. Section 29 provides for suits by the Attorney General to enjoin violations of Commission orders. Section 30 provides for suits by private parties to enforce unsatisfied Commission awards of reparations.

after its entry (28 U.S.C. 2344); the action is against the United States (*ibid.*) and a copy of the petition must be served on the agency and the Attorney General by registered mail (*ibid.*). The Attorney General is given the responsibility for and control of the interests of the government in all court proceedings under the Act and the agency is authorized to appear in the proceeding as a party and as of right (28 U.S.C. 2348). Finally, the court of appeals in which the record on review is filed is given the exclusive jurisdiction to make and enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency" (28 U.S.C. 2349).

The court below held, however, that the district court should have determined whether the Commission's conclusion in this case was correct, even though it had not been attacked pursuant to the exclusive direct review procedures established by the statute. This notion that the district court should have considered the validity of the Commission's conclusion collaterally is patently inconsistent with the existence of the exclusive statutory review scheme. The essence of that scheme is that Commission orders be reviewed only on a timely petition for review which begins a proceeding where the United States and the Commission are parties; here, however, the Commission's conclusion has in effect been relitigated, after the time for direct review expired, in private

litigation without official notification to the government or any government participation of right.[5]

Moreover, the assumption below that Swedish was not a "party" to the administrative proceeding—and thus not "bound" by it (Pet. App. B, 6)—is inconsistent with the petition for reconsideration that Swedish filed with the Commission, where Swedish asserted that it was represented in the administrative evidentiary proceedings through its agent (see p. 5, note 3, *supra*). In any event, even if Swedish had not been represented before the agency, that fact would not have permitted the district court to decide the issue in disregard of the administrative primary jurisdiction that gave rise to the original reference.

b. The decision below is in conflict with *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839. In that case a shipper instituted a proceeding before the Commission to recover reparations for alleged discriminatory practices in violation of various provisions of the Shipping Act. The Commission found that the alleged practices were not violations, but further found that the carrier's charge for demurrage was an unreasonable practice in violation of Section 17 of the Act (3 F.M.B. 608). The shipper

[5] *Volkswagenwerk*, *supra*, on which the court below relied for its decision on the merits, was itself a case in which the Commission's decision under the Shipping Act was rendered upon referral, on primary jurisdiction grounds, by a federal court in California. The Commission's determinations were reviewed, however, under the Administrative Orders Review Act in the Court of Appeals for the District of Columbia Circuit and thereafter on certiorari by this Court. See *Volkswagenwerk*, 390 U.S. at 266–268.

refused the carrier's tender of reparations for the improper demurrage charge and then sued in the district court, alleging the invalidity of the Commission's order and seeking a judgment for the larger amount it had originally claimed before the Commission. The Court of Appeals for the Second Circuit affirmed the district court's dismissal for lack of jurisdiction because the shipper had failed to follow the exclusive remedy provided by the Administrative Orders Review Act of 1950, *i.e.*, appeal from the Commission's order to the court of appeals within the sixty-day period. The ruling below, which would allow the validity of the Commission's orders to be determined by the district court and despite the expiration of the sixty-day period, cannot be squared with *Piazza*.

c. The impact of the decision below is not limited to orders of the Federal Maritime Commission. For the scheme of review provided by the Administrative Orders Review Act applies as well to orders of the Federal Communications Commission, the Secretary of Agriculture, the Maritime Administration and the Atomic Energy Commission.

2. Although we believe that this Court should review and reverse the decision below on the ground that it improperly reached the question of the validity of the tariff amendment, we note further that that questions is, on the merits, an important one that would warrant this Court's consideration in an appropriate case. We believe that the court of appeals misapplied this Court's decision in *Volkswagenwerk, supra,* in holding that Terminals' tariff amendment was invalid because it had not received the Commission's specific

prior approval under Section 15 of the Shipping Act.

The dispute in *Volkswagenwerk* was not whether collective action was within the scope of an agreement previously filed and approved by the Commission, but whether a particular agreement, which apportioned certain labor welfare costs, had to be filed at all. In this case, however, the conference--Terminals—was already operating under a basic agreement authorizing its members to act collectively in fixing tariff rates. The issue, therefore, is whether a further agreement affecting such collectively made rates by shifting their incidence is sufficiently within the contemplation of the basic agreement, as already approved by the Commission, so that no further approval is required. The difference between these two types of situation is crucial to the administration of the Shipping Act.

In *Volkswagenwerk,* there was no filing at all with the Commission relating to the subject matter in question. Here, on the other hand, there were both an underlying agreement that had been approved by the Commission, and a filing of the tariff changes, which made them subject to Commission review; upon such review, the Commission may withdraw approval of the basic agreement itself, or require its modification. See *Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336, 339 (C.A.D.C.), certiorari denied, 368 U.S. 931.

Thus, the only question here is whether the tariff amendment was in fact within the scope of the basic agreement as approved, a question which turns largely on the Commission's expert knowledge of industry practices and the context in which its own ap-

proval had been given. The court below failed to take into account the numerous decisions which admonish that the Commission be allowed a broad leeway in delineating the scope of such an agreement. *North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Commission,* 397 F. 2d 683, 685 (C.A.D.C.); *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 375 F. 2d 335, 339, 342 (C.A.D.C.); *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission,* 314 F. 2d 928, 935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277, 281 (C.A.D.C.). Similarly, the court below was mistaken in its view that *Volkswagenwerk* overruled the Commission's interpretation, settled for over 40 years, that a conventional tariff change is not a "modification" which requires approval in addition to the approval of the basic agreement. *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125; *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, affirmed *sub nom. Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336 (C.A.D.C.), certiorari denied, 368 U.S. 931; *Agreement No. 9025: Dockage Agreement,* 8 F.M.C. 381; *Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.,* 9 F.M.C. 563, 570–571.[6]

[6] The Commission's long-standing interpretation has been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress never saw fit to make any changes in Section 15 which would alter the practice. See *Empire State, supra,* 291 F. 2d at 340–341. Indeed, in amending Section 15 in 1961 Congress apparently intended to codify the Commission's interpretation. For it expressly excepted tariff rate changes and explanatory

This issue is important. There are annually filed with the Commission a combined total of almost 300,000 tariff rate changes relating to foreign trade and terminal operations alone. See, *e.g.*, Annual Reports of the Federal Maritime Commission for 1969 at pp. 18, 31, and for 1968 at pp. 31, 45. The vast majority of these changes are undoubtedly filed by conferences operating under approved conference agreements. The ruling below, if allowed to stand, would cast doubt on the validity of many of these, at least those which represent a change in incidence. Since this ruling is contrary to what has been the long-held understanding of the Commission and shipping interests, the question warrants a definitive declaration by this Court.

---

regulations made pursuant to an approved conference agreement, from the requirement that "every agreement" or "modification" be filed and approved before being implemented:

"* * * tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with [specified terms]." (75 Stat. 762, 764, 46 U.S. 814 (1964 ed.).)

See H. Rep. 498, 87th Cong., 1st Sess., 19–20, paras. (9)–(11); S. Rep. 860, 87th Cong., 1st Sess., 18; Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess., 460–461. See also *Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, 66, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (C.A.D.C.).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

HOWARD E. SHAPIRO,
IRWIN A. SEIBEL,
Attorneys.

JAMES L. PIMPER,
General Counsel,

GORDON M. SHAW,
Attorney,
Federal Maritime Commission.

MARCH 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970